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No. 94-1320

In the Supreme Court of the United States

OCTOBER TERM, 1994

RONNIE G. VAIL, ET AL., PETITIONERS

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the procedures followed by the Department of Veterans Affairs in seeking deficiency judgments from veterans following foreclosure sales satisfy the Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D3) is reported at 39 F.3d 208. The opinion of the district court (Pet. App. C1-C24) is reported at 841 F. Supp. 909. The prior opinion of the court of appeals (Pet. App. B1-B17), as amended (Pet. App. B18-B19), is reported at 946 F.2d 589 and 956 F.2d 812. The prior opinion of the district court (Pet. App. A1-A12) is reported at 742 F. Supp. 1039.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1994. The petition for a writ of certiorari was filed on January 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) provides housing assistance to veterans by guaranteeing home loans made by private lenders. See Servicemen's Readjustment Act of 1944, ch. 268, Tit. III, 58 Stat. 291-293; 38 U.S.C. 1801-1833.[1] Under the statutory scheme applicable to petitioners, veterans were charged a one percent fee for a VA loan. See 38 U.S.C. 1829(a). In return, veterans were assured a maximum interest rate (generally below market rate) for guaranteed loans, as well as limits on closing costs and other fees. 38 U.S.C. 1803(c); 38 C.F.R. 36.4311, 36.4312.

If a veteran or a subsequent purchaser defaults on a loan, the lender is required to give the VA at least 30 days' notice before foreclosing on the property. 38 U.S.C. 3732(c)(3)(A) (Supp. V 1993); 38 C.F.R. 36.4317. The VA may either purchase the loan or instruct the lender to foreclose. 38 C.F.R. 36.4324. If the VA directs the lender to foreclose, the lender must follow the VA's instructions concerning the appropriate

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[1] In 1991, Congress renumbered the statutory scheme, which is now codified at 38 U.S.C. 3701-3735 (Supp. V 1993). See Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, § 5(a), 105 Stat. 406. Except where otherwise noted, all references are to the codification of the statutory scheme as it appears in the 1988 edition of the United States Code.

method and timing of the foreclosure. 38 C.F.R. 36.4324(f).

Foreclosures proceed in accordance with state law. Minnesota permits both judicial and non-judicial foreclosure. Judicial foreclosure requires notice to the mortgagor; non-judicial foreclosure requires an advertisement, but does not require personal notice to the mortgagor. Minnesota law bars a mortgagee from obtaining a deficiency judgment following a non-judicial foreclosure. The VA usually directs a lender to use the non-judicial foreclosure procedure. Pet. App. B3-B4.

If a lender forecloses in accordance with the VA's instructions and the property is sold for less than the balance due on the loan, the VA must reimburse the lender for the deficiency up to the amount of the guaranty. 38 C.F.R. 36.4321. The veteran, in turn, is obligated to reimburse the VA for any sum paid by the VA to the private lender. 38 C.F.R. 36.4323(e). If a veteran allows a purchaser to assume the VA-guaranteed mortgage, and the purchaser defaults, the veteran remains liable for any deficiency. 38 C.F.R. 36.4323(f).

Before the VA collects any money from the veteran, the veteran is entitled to challenge the existence or amount of the debt before the Board of Veterans' Appeals. 38 C.F.R. 1.911(c). The veteran may also request a waiver on equitable grounds. See 38 C.F.R. 1.911(c)(2), 1.912. The veteran may seek review of those determinations in the Court of Veterans Appeals, and then in the Court of Appeals for the Federal Circuit. 38 C.F.R. 1.911(c); see 38 U.S.C. 7252, 7292 (Supp. V 1993).

2. Petitioners are Minnesota veterans who either defaulted on home loans guaranteed by the VA or sold

their homes to buyers who defaulted on their loans. The private lender then foreclosed in non-judicial proceedings and collected deficiencies from the VA. The VA, in turn, sought indemnification from petitioners for the amount it had paid to the lenders. Pet. App. B2-B3.

Petitioners filed a class action suit against the VA, alleging that Minnesota law prohibits the VA from obtaining a deficiency judgment following a non-judicial foreclosure proceeding. The district court agreed with petitioners, holding that the VA was "without authority to enforce deficiency judgments against [petitioners] for loan guaranty payments made to mortgage lenders following non-judicial foreclosure of Minnesota real estate." Pet. App. A12.

The court of appeals rejected the district court's reasoning, holding that the Minnesota anti-deficiency statute does not bar third parties, such as the VA, from enforcing a separate indemnity agreement with the borrower. Pet. App. B10. The court concluded, however, that the VA's participation in a foreclosure scheme that does not afford notice of the foreclosure to veterans "raises serious due process questions." *Id.* at B11-B12. Without resolving that constitutional question, the court held that "the VA must make a good faith attempt to provide reasonable personal notice to the indemnitor of the foreclosure sale before it can obtain a recovery under its indemnity contract." *Id.* at B16. In a subsequent amendment to its opinion, the court of appeals noted that the VA is statutorily required to notify the veteran prior to foreclosure. *Id.* at B18-B19; see 38 U.S.C. 1832(a)(4)(A).

On remand, the district court held that the "existing VA procedures and regulations satisfy due

process." Pet. App. C12. The court explained that the VA's notification forms "provide notice of foreclosure and its attendant consequences at 'a meaningful time and in a meaningful manner.'" *Id.* at C14-C15. The court rejected petitioners' contention that the VA must afford veterans an administrative hearing prior to a non-judicial foreclosure. The court concluded that the notice provided by the VA "is fully sufficient to permit the veteran to participate in the foreclosure sale and to exercise his or her pre-foreclosure options." *Id.* at C17.

The court of appeals affirmed, explaining that it "agree[d] with the reasoning of the district court." Pet. App. D3.

ARGUMENT

Petitioners contend that the procedures that the VA follows in seeking deficiency judgments from veterans do not satisfy the Due Process Clause. Because the court of appeals correctly rejected that contention, and there is no conflict in the circuits on that issue, review by this Court is not warranted.

Due process is a "flexible" concept, calling "for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). In deciding what process is due, the following factors typically are considered: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of that interest through the current procedures; (3) the value of any additional or substitute procedures; and (4) the burdens that such additional or substitute procedures would impose on the government. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976); see, *e.g.*, *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 501 (1993).

Consideration of those factors leads to the conclusion that the procedures followed by the VA before it attempts to collect a deficiency resulting from a foreclosure sale satisfy due process.

As the lower courts found (Pet. App. C14-C15, C17, D3), the VA provides veterans with ample notice of a foreclosure sale. The notices sent by the VA inform the veteran that a foreclosure is imminent and that the veteran will be liable to the VA for any deficiency at the foreclosure sale. *Id.* at C12-C14 & nn.7, 8, 10. As the lower courts concluded, those notices are "fully sufficient to permit the veteran to participate in the foreclosure sale and to exercise his or her pre-foreclosure options." *Id.* at C17, D3.

Petitioners contend (Pet. 20) that such notice is insufficient to ensure that property sold at a non-judicial foreclosure proceeding will be sold for fair value. According to petitioners (Pet. 24-25), due process requires the VA to hold an administrative hearing on the value of the property prior to a non-judicial foreclosure. Current procedures, however, adequately protect a veteran's interest in having the property sold for fair value. The VA instructs the lender to bid an amount that is based on the VA's assessment of the fair value of the property (38 U.S.C. 3732 (Supp. V 1993)); the lender is required by state law to advertise the foreclosure sale (Pet. App. B3-B4); and veterans are free to submit their own bids or solicit bids from others.

Moreover, before the VA collects on a deficiency, veterans are permitted to challenge "the existence or amount of the debt," 38 C.F.R. 1.911(c), and one possible ground for such a challenge is that the VA did not accurately assess the property's fair market value. The statute and regulations also provide for

a waiver of the veteran's liability in appropriate circumstances. See page 3, *supra*. Veterans have a right to appeal the initial decision on such issues to the Board of Veterans' Appeals. 38 C.F.R. 1.911(c). They may then seek further review before the Court of Veterans Appeals and the Court of Appeals for the Federal Circuit. 38 U.S.C. 7252, 7292 (Supp. V 1993). That review process affords veterans a full and fair opportunity, before the VA seeks to collect on a deficiency, to establish that the VA did not accurately assess the property's fair market value.

The policy of the VA housing program "is, broadly stated, to enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure, to both the veteran and the [VA] as guarantor." *United States* v. *Shimer*, 367 U.S. 374, 383 (1961). The procedures followed by the VA achieve those goals, while simultaneously satisfying the demands of due process.[2]

Petitioners contend (Pet. 25-29) that there is a conflict in the circuits on the question presented in this case. There is, however, no such conflict. The Fourth Circuit is the only other court of appeals to have addressed the issue presented here. And like the court of appeals in this case, the Fourth Circuit has held that the VA must provide veterans with notice of the foreclosure proceeding. See *Boley* v. *Brown*, 10

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[2] In 1989, Congress increased the loan fee payable by the veteran at closing, and payment of that fee releases the veteran from liability for any deficiency except for cases of fraud, misrepresentation, or bad faith. See Veterans' Benefits Amendments of 1989, Pub. L. No. 101-237, §§ 303(a), 304(a), 103 Stat. 2071-2073; 38 U.S.C. 3703(e)(1), 3729(a) (Supp. V 1993). The court of appeals' decision therefore affects only those veterans, like petitioners, who closed their loans prior to 1990.

F.3d 218, 222 (1993). Neither the Fourth Circuit nor any other court has adopted petitioners' view that due process requires an administrative hearing prior to a non-judicial foreclosure proceeding.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] In *Rank* v. *Nimmo*, 677 F.2d 692, 701-702, cert. denied, 459 U.S. 907 (1982), cited by petitioner (Pet. 28), the Ninth Circuit held that the VA's refusal to refund a loan did not implicate the Due Process Clause. The court did not address the question of what process, if any, the VA must afford prior to collecting on a deficiency resulting from a foreclosure sale.